STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, vs. DANIEL A. REYNOLDS, Respondent.	)	Case No. 07-2883EF

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on May 29, 2008, in Sebring, Florida.

APPEARANCES

For Petitioner: Chadwick R. Stevens, Esquire
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For Respondent: Joseph D. Farish, Jr., Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Daniel A. Reynolds, should take corrective action and pay investigative costs for allegedly controlling, eradicating, removing, or otherwise altering aquatic vegetation on eighty-seven feet of shoreline adjacent to his

property on Lake June-in-Winter (Lake June) in Highlands County, Florida, without an aquatic plant management permit.

PRELIMINARY STATEMENT

On May 15, 2007, Petitioner, Department of Environmental Protection (Department), filed a Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment (Notice) under Section 403.121(2), Florida Statutes.[1] The Notice alleged that in July 2006, the Department conducted an inspection of Respondent's property in Highlands County, Florida, and discovered that the aquatic vegetation had been chemically controlled, which resulted in eighty-seven feet of shoreline on Lake June adjacent to Respondent's property being "devoid of aquatic vegetation." The Notice further alleged that Respondent had engaged in this activity without a permit in violation of Section 369.20(7), Florida Statutes, and Florida Administrative Code Rule 62C-20.002(1). For violating the statute and rule, the Department sought to impose a $3,000.00 administrative penalty and require repayment of reasonable investigative costs and expenses. The Notice also described certain corrective actions to be taken by Respondent.

On June 25, 2007, Respondent filed his Petition for Administrative Proceeding in which he denied the allegations and requested a hearing to contest the charges. The matter was referred by the Department to the Division of Administrative Hearings on June 29, 2007, with a request that an administrative

law judge be assigned to conduct a hearing. By Notice of Hearing dated July 11, 2007, a final hearing was scheduled on August 28, 2007, in Sebring, Florida. On August 20, 2007, the Department filed an unopposed Motion for Continuance of Final Hearing on the ground the parties were seeking to settle the matter and additional time was needed to conduct discovery. Thereafter, by Order dated August 23, 2007, the matter was temporarily abated. At the request of the parties, it was later rescheduled to May 29, 2008, at the same location.

On April 24, 2008, the Department filed a Motion for Leave to Amend Notice of Violation. By Order dated May 2, 2008, leave to file an Amended Notice of Violation and Orders for Corrective Action (Amended Notice) was granted. The Amended Notice modified the original Notice by alleging that the aquatic vegetation in Lake June had been controlled, eradicated, removed, or otherwise altered rather than being chemically treated; eliminated the imposition of an administrative penalty; requested recovery of investigative costs and expenses of not less than $179.00; and modified the corrective action by requiring Respondent to replant 126 Pickerelweed in Lake June and obtain a permit from the Department to remove aquatic plants. Respondent's Answer to the Amended Notice was filed on May 12, 2008. By eliminating the request for an administrative penalty, the Department "retains its final-order authority" in this matter. See § 403.121(2)(c), Fla. Stat.

On May 23, 2008, the parties filed their Joint Pre-Hearing Stipulation. By letter dated May 27, 2008, Respondent filed a notice with opposing counsel advising that he intended to present a previously undisclosed expert witness and offer several new exhibits, including a digital video disc (DVD) of Respondent's property taken in June 2007 and a series of nine photographs taken in 2003 and 2007. In response to that notice, Petitioner filed a Motion in Limine (Motion). Because the witness did not appear at the hearing, that portion of the Motion was rendered moot. With the exception of the photographs taken in 2007 (Respondent's Exhibits 1-4), the Department continues to object to the introduction of the other photographs and DVD.

At the final hearing, the Department presented the testimony of Respondent; Timothy C. Meier, who lives near Respondent on Lake June; Erica C. Van Horn, a Regional Biologist with its Bartow office and accepted as an expert; and William Caton, Chief of the Bureau of Invasive Plant Management and accepted as an expert. Also, it offered Department's Exhibits 1-8, which were received in evidence. Respondent's ore tenus Motion to Dismiss made at the conclusion of the Department's case-in-chief was denied. Respondent testified on his own behalf and presented the testimony of Brian Proctor, a consultant and accepted as an expert; and Donna Reynolds, his wife. Also, he offered Respondent's Exhibits 1-10. A ruling was reserved on Exhibits 5-9, which are photographs of Respondent's and a neighbor's

property taken in June 2003, and Exhibit 10, a DVD of Respondent's property recorded in June 2007, and which are the subject of the Department's Motion in Limine. Exhibit 10 is hereby received in evidence, while the objection to Exhibits 5-9 is sustained.[2] Finally, the undersigned has granted the Department's request to take official recognition of Section 369.20, Florida Statutes, and Florida Administrative Code Rule Chapter 62C-20.

A Transcript of the hearing (two volumes) was filed on July 17, 2008. Proposed Findings of Fact and Conclusions of Law were filed by Respondent and the Department on July 23 and 30, 2008, respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. Respondent is the riparian owner of the property located at 260 Lake June Road, Lake Placid, Highlands County (County), Florida. He has owned the property since 2001 and resides there with his wife and two young children. The parcel is identified as Parcel ID Number C-25-36-29-A00-0171-0000. The southern boundary of his property, which extends around eighty-seven feet, abuts Lake June. Respondent has constructed a partially covered dock extending into the waters of Lake June, on which jet skis, a canoe, and other recreational equipment are stored.

2. The Department is the administrative agency charged with protecting the State's water resources and administering and enforcing the provisions of Part I, Chapter 369, Florida Statutes, and the rules promulgated under Title 62 of the Florida Administrative Code.

3. The parties have stipulated that Lake June is not wholly-owned by one person; that it was not artificially created to be used exclusively for agricultural purposes; that it is not an electrical power plant cooling pond, reservoir, or canal; and that it has a surface area greater than ten acres. As such, the parties agree that Lake June constitutes "waters" or "waters of the state" within the meaning of Florida Administrative Code Rule 62C-20.0015(23), and is not exempt from the Department's aquatic plant management permitting program under Florida Administrative Code Rule 62C-20.0035.

4. Unless expressly exempted, a riparian owner who wishes to control, eradicate, remove, or otherwise alter any aquatic plants in waters of the state must obtain an aquatic plant management permit from the Department. See § 369.20(7), Fla. Stat.; Fla. Admin. Code R. 62C-20.002(1). An aquatic plant is defined as "any plant, including a floating plant, emersed, submersed, or ditchbank species, growing in, or closely associated with, an aquatic environment, and includes any part or seed of such plant." See Fla. Admin. Code R. 62C-20.0015(1). These plants are found not only in the water, but also along the

shoreline when the water recedes below the high water mark. They provide important habitat for fish, insects, birds, frogs, and other animals. Torpedo Grass and Maidencane are two common species of aquatic plants or weeds.

5. Applications for a permit are filed with one of the Department's regional offices. After a site inspection is made, a permit is issued as a matter of right without charge or the need for a hearing, and it is effective for a period of three years. A Department witness indicated that there are approximately 1,300 active permits at the present time, including an undisclosed number of permits for property owners on Lake June.[3] It is undisputed that Respondent has never obtained a permit.

6. A statutory exemption provides that "a riparian owner may physically or mechanically remove herbaceous aquatic plants . . . within an area delimited by up to 50 percent of the property owner's frontage or 50 feet, whichever is less, and by a sufficient length waterward from, and perpendicular to, the riparian owner's shoreline to create a corridor to allow access for a boat or swimmer to reach open water." § 369.20(8), Fla. Stat. The exemption was established so that riparian owners could create a vegetation-free access corridor to the waterbody adjacent to their upland property. The statute makes clear that "physical or mechanical removal does not include the use of any chemicals . . . ." Id. If chemicals are used, the exemption

does not apply. Under the foregoing exemption, Respondent could remove up to 43.5 feet of aquatic vegetation in front of his property on Lake June, or one-half of his eighty-seven foot shoreline.

7. By way of background, since purchasing his property in 2001, Respondent has had a long and acrimonious relationship with his two next door neighbors, Mr. Slevins (to the west) and Mr. Krips (to the east).[4] Neither neighbor uses Lake June for recreational purposes. After purchasing the property, Respondent says that Mr. Slevin began to verbally harass and threaten his family, particularly his wife. When Respondent observed the two neighbors repeatedly trespassing on his property, including the placing of an irrigation system and a garden over the boundary lines, Respondent built a fence around his lot, which engendered a circuit court action by the neighbors over the correct boundary line of the adjoining properties. Respondent says the action was resolved in his favor.

8. According to Respondent, Mr. Slevins and Mr. Krips have filed "probably 100 to 200 different complaints on everything from barking dogs, to weeding the yard to calling DEP." Respondent also indicated that Mr. Slevins is a personal friend of the Highlands County Lakes Manager, Mr. Ford. As his title implies, Mr. Ford has the responsibility of inspecting the lakes in the County. If he believes that aquatic vegetation has been unlawfully removed or altered, he notifies the Department's South

Central Field Office (Field Office) in Bartow since the County has no enforcement authority. Mr. Reynolds says that a personal and social relationship exists between Mr. Slevins and Mr. Ford, and through that relationship, Mr. Slevins encouraged Mr. Ford to file at least two complaints with the Field Office alleging that Respondent removed aquatic vegetation in Lake June without a permit.

9. In 2002, the Department received a complaint about "aquatic plant management activity" on Respondent's property. There is no indication in the record of who filed the complaint, although Respondent suspects it was generated by Mr. Slevins. In any event, after an inspection of the property was made by the then Regional Biologist, and improper removal of vegetation noted, Respondent was sent a "standard warning letter" that asked him "to let it regrow" naturally. According to the Department's Chief of the Bureau of Invasive Plant Management, Mr. William Caton, Respondent "did not" follow this advice.

10. In 2004, another complaint was filed, this time by the Highlands County Lakes Manager. After an inspection was made, another letter was sent to Respondent asking him to "let it regrow," to implement a revegetation plan, and to contact the Department's Regional Biologist. After receiving the letter, Respondent's wife telephoned Mr. Caton, whose office is in Tallahassee, and advised him that the complaint was the result of "a neighbor feud." Among other things, Mr. Caton advised her

that the Department would not "get in the middle" of a neighbor squabble. At hearing, he disputed Mrs. Reynolds' claim that he told her to disregard the warning letter. He added that Respondent did not "follow through with" the corrective actions.

11. As a result of another complaint being filed by the Highlands County Lakes Manager in 2006, a field inspection was conducted on July 12, 2006, by a Department Regional Biologist, Erica C. Van Horn. When she arrived, she noticed that the property was fenced and locked with a "Beware of Dog" sign. Ms. Van Horn then went to the home of Mr. Slevins, who lives next door, and was granted permission to access his property to get to the shoreline.

12. The first thing Ms. Van Horn noticed was that the "lake abutting 260 Lake June Road was completely devoid of vegetation." She further noted that "on either side of that property [there was] lush green Torpedo Grass." Ms. Van Horn found it "very unusual" for the vegetation to stop right at the riparian line. Although she observed that there was "a small percentage of Maidencane" on the site, approximately ninety to ninety-five percent of the frontage "was free of aquatic vegetation." Finally, she noted that the dead Torpedo Grass on the east and west sides of the property was in an "[arc] shape pattern," which is very typical when someone uses a herbicide sprayer.

13. During the course of her inspection, Ms. Van Horn took four photographs to memorialize her observations. The pictures

were taken from the east and west sides of Respondent's property while standing on the Slevins and Krips' properties and have been received in evidence as Department's Exhibits 1-4. They reflect a sandy white beach with virtually no vegetation on Respondent's shoreline or in the lake, brown or dead vegetation around the property lines on each side, and thick green vegetation beginning on both the Slevins and Krips' properties. The dead grass to the east had been chopped into small pieces.

14. During her inspection, Ms. Van Horn did not take any samples or perform field testing to determine if herbicides had been actually used since such testing is not a part of the Department's inspection protocol. This is because herbicides have a "very short half life," and they would have broken down by the time the vegetation turns brown leaving no trace of the chemicals in the water. Ms. Van Horn left her business card at the gate when she departed and assumed that Respondent would contact her. On a later undisclosed date, Respondent telephoned Ms. Van Horn, who advised him that he was out of compliance with regulations and explained a number of ways in which he could "come into compliance with these rules," such as revegetation. She says he was not interested.

15. After her inspection was completed, Ms. Van Horn filed a report and sent the photographs to Mr. Caton for his review. Mr. Caton has twenty-seven years of experience in this area and has reviewed thousands of sites during his tenure with the

Department. Based on the coloration of the vegetation right next to the green healthy vegetation on the adjoining properties, Mr. Caton concluded that the vegetation on Respondent's property had "classic herbicide impact symptoms." He further concluded that the vegetation had been chemically sprayed up to the boundary lines on each side of Respondent's property before it was cut with a device such as a weedeater. Based on the history of the property involving two earlier complaints, Respondent's failure to take corrective action, and the results of the most recent inspection, Mr. Caton recommended that an enforcement action be initiated.

16. On August 11, 2006, Ms. Van Horn sent Respondent a letter advising him that a violation of Department rules may have occurred based upon the findings of her inspection. The letter described the unlawful activities as being "removal of aquatic vegetation from the span of the total adjacent shore line and significant over spray on to aquatic vegetation of neighboring properties on either side of [his] property." Respondent was advised to contact Ms. Van Horn "to discuss this matter."

17. On May 15, 2007, the Department filed its Notice alleging that Respondent had "chemically controlled" the aquatic vegetation on eighty-seven feet of his shoreline in violation of Section 369.20(7), Florida Statutes, and Florida Administrative Code Rule 62C-20.002(1). The Notice sought the imposition of an administrative penalty in the amount of $3,000.00, recovery of

reasonable investigative costs and expenses, and prescribed certain corrective action. On April 28, 2008, the Department filed an Amended Notice alleging that, rather than chemically removing the vegetation, Respondent had controlled, eradicated, removed, or otherwise altered the aquatic vegetation on his shoreline. The Amended Notice deleted the provision requesting the imposition of an administrative penalty, expressly sought the recovery of investigative costs and expenses of not less than $179.00, and modified the corrective action.

18. After her initial inspection, Ms. Van Horn rode by the property in a Department boat on several occasions while conducting other inspections on Lake June and observed that the property "was still mostly devoid of vegetation." At the direction of a supervisor, on June 15, 2007, she returned to Respondent's property for the purpose of assessing whether any changes had occurred since her inspection eleven months earlier. This inspection was performed lakeside from a Department boat without actually going on the property, although she spoke with Respondent's wife who was standing on the dock. Ms. Van Horn observed that the area was still "devoid of vegetation but there was some Torpedo Grass growing back on the [eastern] side." She estimated that "much more" than fifty percent of the shoreline was free of vegetation. Photographs depicting the area on that date have been received in evidence as Department's Exhibits 5-7.

19. Both Respondent and his wife have denied that they use any chemicals on their property, especially since their children regularly swim in the lake in front of their home. Respondent attributes the loss of vegetation mainly to constant use of the back yard, dock area, and shoreline for water-related activities, such as swimming, using jet skis, fishing, and launching and paddling a canoe. In addition, the Reynolds frequently host parties for their children and their friends, who are constantly tramping down the vegetation on the shoreline and in the water. He further pointed out that beginning with the house just beyond Mr. Krip's home, the next five houses have "no vegetation" because there are some areas on the lake that "naturally do not have any vegetation across them." Finally, he noted that Lake Juno suffered the impacts of three hurricanes in 2004, which caused a devastating effect on its vegetation.

20. Respondent presented the testimony of Brian Proctor, a former Department aquatic preserve manager, who now performs environmental restoration as a consultant. Mr. Proctor visited the site in June 2007 and observed "full and thick" Torpedo Grass "growing in the east and west of the property lines." Based on that inspection, Mr. Proctor said he was "comfortable stating that at the time [he] did the site visit in June of '07 there was nothing that appeared to be chemical treatment on Mr. Reynold's property." He agreed, however, that the "shoreline vegetation was poor," and he acknowledged that it was unusual that Lake Juno

was lush with aquatic vegetation in front of the neighboring properties to the east and west but stopped at Respondent's riparian lines. When shown the June 2006 photographs taken by Ms. Van Horn, he acknowledged that it "appeared" the property had been chemically treated. He was able to make this determination even though a soil test had not been performed.

21. Photographs introduced into evidence as Respondent's Exhibits 1-4 reflect that on June 27, 2007, there was thick green vegetation on both sides of his property, although one photograph (Respondent's Exhibit 1) shows only limited vegetation along the shoreline and in the lake in the middle part of the property. The photographs are corroborated by a DVD recorded by Respondent on the day that Ms. Van Horn returned for a follow-up inspection. While these photographs and DVD may impact the amount of corrective action now required to restore the property to its original state, they do not contradict the findings made by Ms. Van Horn during her inspection on July 12, 2006. Finally, photographs taken in 2003 to depict what appears to be chemical spraying of vegetation and the construction of a bulkhead without a permit by Mr. Slevins have no probative value in proving or disproving the allegations at issue here.

22. The greater weight of evidence supports a finding that it is very unlikely that heavy usage of the shoreline and adjacent waters in the lake by Respondent's family and their guests alone would cause ninety-five percent of the shoreline and

lake waters to be devoid of vegetation when the inspection was made in July 2006. Assuming arguendo that this is true, Respondent was still required to get a permit since the amount of vegetation altered or removed through these activities exceeded more than fifty percent of the vegetation on the shoreline.

23. More than likely, the vegetation was removed by a combination of factors, including recreational usage, mechanical or physical means, and the application of chemical herbicides on each riparian boundary line, as alleged in the Amended Notice. The fact that the Department did not perform any testing of the water or soil for chemicals does not invalidate its findings. Finally, the acrimonious relationship that exists between Respondent and his neighbors has no bearing on the legitimacy of the charges. Therefore, the allegations in the Amended Notice have been sustained.

24. The parties have stipulated that if the charges are sustained, Respondent is entitled to recover reasonable costs and expenses associated with this investigation in the amount of $179.00.

25. As corrective action, the Amended Notice requires that Respondent obtain a permit to remove Torpedo Grass from his property and to replant "126 well-rooted, nursery grown Pontederia cordata ("pickerelweed") at the locations depicted on the map" attached to the Amended Notice. Because the evidence suggests that some of the area in which vegetation was removed in

2006 had regrown by July 2007, the proposed corrective action may be subject to modification, depending on the current state of the property.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 403.121, Florida Statutes.

27. Section 403.121(2), Florida Statutes, prescribes the administrative enforcement process for the Department "to establish liability and to recover damages for any injury to the air, waters, or property . . . of the state caused by any violation." Under that process, the Department is authorized to "institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action." § 403.121(2)(b), Fla. Stat. The process is initiated by "the department's serving of a written notice of violation upon the alleged violator by certified mail." § 403.121(2)(c), Fla. Stat. If a hearing is requested by the alleged violator, "the department has the burden of proving with the preponderance of the evidence that the respondent is responsible for the violation." § 403.121(2)(d), Fla. Stat. Thereafter, "the administrative law judge shall issue a final order on all matters, including the imposition of an administrative penalty." Id. In the event an administrative

penalty is not sought, "[t]he department retains its final-order authority." Id. Therefore, a recommended order is being entered in this case.

28. In Count I of the Amended Notice, the Department has alleged that "aquatic vegetation had been controlled, eradicated, removed, or otherwise altered in Lake June-in-Winter adjacent to [Respondent's] property." Count II seeks the recovery of expenses incurred to date while investigating this matter in the amount of not less than $179.00.

29. By a preponderance of evidence, the Department has established that the aquatic vegetation has been controlled, eradicated, removed, or otherwise altered in Lake June adjacent to Respondent's property without a permit. § 369.20(7), Fla. Stat. Therefore, the charge in Count I has been sustained.

30. Because an administrative penalty has not been sought by the Department, it is unnecessary to consider mitigating evidence that would otherwise be presented for mitigating the amount of the penalty. See § 403.121(10), Fla. Stat.

31. Section 403.141(1), Florida Statutes, allows the Department to recover "the reasonable costs and expenses of the state" in investigating enforcement matters. The parties have stipulated that the Department is entitled to recover $179.00.

32. In paragraphs 11 through 16 of the Amended Notice, the Department describes the corrective action to be taken in order to redress the violations. In general terms, Respondent is

required to apply for a permit and to plant 126 pickerelweed at locations depicted on a map attached to the Amended Notice. This corrective action appears to be reasonable and should be approved. However, given that some vegetation has regrown on Respondent's property since the 2006 inspection, the Department should reinspect the site to determine if the corrective action should be modified.

33. Finally, Section 403.121(2)(f), Florida Statutes, provides in part that "[i]n any administrative proceeding brought by the department, the prevailing party shall recover all costs as provided in ss. 57.041 and 57.071. The costs must be included in the final order." Because the undersigned is entering a recommended order, and no evidence on this issue was presented, no findings on the recovery of costs have been made. Likewise, Respondent's request for reasonable attorney's fees and costs pursuant to Section 57.105, Florida Statutes, is denied.

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department sustaining the charges in the Amended Notice. It is further recommended that the corrective actions described in the Amended Notice be taken by Respondent, to the extent they are now necessary. Finally, the Department is entitled to recover $179.00 in costs and expenses incurred while investigating this matter.

DONE AND RECOMMENDED this 12th day of August, 2008, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of August, 2008.

ENDNOTES

1/ All references herein to the Florida Statutes are to the 2007 version.

2/ Videotapes and DVDs are admissible on the same basis as still photographs. In this case, Respondent established a foundation for the DVD's admission by testifying that it was a fair and accurate depiction of his property on June 27, 2007. The Department also objected on the ground it had no opportunity to examine the DVD until the hearing. The record shows, however, that the DVD was shown to the original Department counsel (who was later replaced by present counsel) at a mediation session in August 2007. As to the challenged photographs (Exhibits 5-9), which depict the shorelines on both Respondent's and Mr. Slevins' property in June 2003, as noted in Finding of Fact 21, supra, they have no probative value in resolving the issues in this case.

3/ When a permit is issued to remove invasive plants, the property owner may be required to replant something in its place, depending on whether the owner has sufficient plants already on the site to reestablish the area.

4/ Mr. Krips is spelled as "Krips" in the Pre-Hearing Stipulation, as "Cripps" in the Transcript, and as "Kribs" by a witness who was asked to spell the name. The first version has been used in this Recommended Order.

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.